



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 11, 1998

Mr. David R. Gipson  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR98-0419

Dear Mr. Gipson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113629.

The Texas Department of Agriculture (the "department") received a request for information relating to five incident investigations. You do not object to the disclosure of information in Incident No. 02-94-0056. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you assert that section 552.103 excepts Incident No. 02-98-0005 from public disclosure. To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

The department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapter 76 of the Agriculture Code. Agric. Code § 76.007(a). Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 76.1555(h). In this instance, the department has supplied this office with information which shows that there is an ongoing investigation, and the department will take enforcement action as authorized by statute. We conclude that

litigation is reasonably anticipated. We additionally find that the documents submitted by the department are related to the reasonably anticipated litigation for the purposes of section 552.103(a). The documents pertaining to Incident No. 02-98-0005 may, therefore, be withheld pursuant to section 552.103.

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>1</sup>

Next, you contend that the documents pertaining to Incident Nos. 02-95-0006, 02-94-0049, and 02-94-0079 constitute attorney work product and should be excepted from disclosure under section 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 (1996) at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories.

We have reviewed your arguments and the documents and conclude that the documents were created in anticipation of litigation. Furthermore, we find that most of the information reflect the attorney's mental processes, conclusions and legal theories. However, we note that facts acquired by an attorney are not protected under the work product doctrine. *Owens-Corning Fiberglas v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991); Open Records Decision 647 (1996) at 4. Thus, we conclude that, except for the information we have marked, the department may not withhold the factual information in Incident Nos. 02-95-0006, 02-94-0049, and 02-94-0079 from public disclosure under section 552.111 as attorney work product.

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<sup>1</sup>We caution, however, that some of the information may be confidential by law or may implicate the proprietary interest of a third party. Therefore, if the department receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the department should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

In addition, the department may not withhold the factual information under section 552.107 which the department also claims. Basically factual communications from attorney to client, or between attorneys representing the client, are not protected by section 552.107(1). Open Records Decision No. 574 (1990) at 3.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

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Ref.: ID# 113629

Enclosures: Marked documents

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